UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

KANOWITZ FRUIT AND PRODUCE CO., INC.

Employer[1]

and

LOCAL 21, AMALGAMATED CRAFTS AND TRADE UNION — Case No. 29-RC-9268

Petitioner

and

PRODUCE PURVEYORS, FRESH AND FROZEN FRUITS AND VEGETABLES, PROCESSED FISH DRIVERS, HELPERS, SALESMEN AND WAREHOUSEMEN, LOCAL 202, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

Intervenor[2]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Kevin Kitchen, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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[1] The name of the Employer appears as amended at the hearing.
[2] The Intervenor intervened on the basis of a collective bargaining agreement with the Employer.

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that the Employer, a New York corporation with its principal office and place of business located at 37-39 Brooklyn Terminal Market, Brooklyn, New York, herein called the Brooklyn facility, is engaged in the sale and distribution of produce. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $500,000 from the sale of its goods and purchased and received at its Brooklyn facility goods valued in excess of $5,000 directly from suppliers located outside the State of New York.

Based upon the forgoing, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. The Petitioner seeks an election in a unit of all drivers, warehousemen and salespersons employed by the Employer at its Brooklyn facility. The Employer employs approximately 21 employees in the first two classifications and approximately 4 salespersons. The Intervenor maintains that its contract with the Employer bars an election among the Employer's drivers and warehousemen. The Employer and Petitioner contend that the contract is not a bar because it contains an unlawful union security provision. In addition, they

maintain that the contract has been applied on a members only basis, and has not been applied to a majority of the Employer's drivers and warehousemen.[3] The Intervenor, while admitting that the contract has not been applied to most of these employees, asserts that prior to the filing of the petition, it had initiated actions to compel the Employer to apply the contract to the drivers and warehousemen who were not receiving the contractual benefits. Since it is willing and able to enforce the contract, the Intervenor contends the contract bars an election among these employees.

The record shows that on August 28, 1998, pursuant to a Stipulated Election Agreement in Case No. 29-RC-9083, an election was conducted in a unit of "all full time and regular part-time drivers and warehousemen employed by the Employer at its facility located at 37-39 Terminal Market." The Intervenor received a majority of the votes cast, and on September 9, 1998, it was certified as the representative of the employees employed in the above described unit.[4] On November 12, 1998, the Employer and the Intervenor executed a "Memo of Understanding" (MOU) effective December 1, 1998, to November 30, 2004 covering the employees in the aforementioned unit.[5] The MOU provided that with the exception of certain terms of employment set forth therein, the Employer would apply the terms of the Intervenor's contract with another company, Clifton Produce, to its employees. It appears that sometime in late February, 1999, the

[3] During the hearing, the Employer concurred with the Intervenor's position that the contract was a bar. However, in its brief, it adopted the Petitioner's position regarding its bar status.
[4] The Employer's "office clerical employees, guards and supervisors as defined by the Act" were excluded from the bargaining unit.
[5] The unit description in the MOU reads: All full time and part-time warehousemen and drivers of the company but excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

Employer and the Intervenor executed a fully integrated collective bargaining agreement setting forth these terms.[6] The instant petition was filed on May 25, 1999. For the reasons set forth below, I find that an election involving the drivers and warehousemen is prohibited by the Act.

Section 9(c)(3) of the Act provides, in pertinent part:

> No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held.

Initially, with respect to the Petitioner's contention that the union security clause in the current contract is unlawful thus resulting in a forfeiture of bar quality, I find that this issue need not be addressed at this time. The Board has found that the fact that an employer and union enter into a contract with an unlawful union security provision during the anniversary period following an election, or apply that contract in an unlawful manner, does not render Section 9(c)(3) inoperative. Randolph Metal Works, 147 NLRB 973 (1964). In Vickers, Inc., 124 NLRB 1051 (1959) the Board announced that in its application of Section 9(c)(3) it would dismiss all petitions filed more than 60 days prior to the anniversary date of an election in the same unit covered by the petition.[7] In the

[6] The signatures are undated. Steven Kanowitz, the Employer's owner, did not recall the date he executed the contract. The Intervenor's Recording Secretary, Charlie Machadio, testified that the contract was executed by both parties by late February, 1999.

[7] Where the unit in which an election is conducted constitutes a relatively small portion of a unit covered by a subsequent petition, Section 9(c)(3) does not prohibit these employees from participating in an election resulting from the latter petition conducted within 12 months of the original election. Thus, the Board has held that an election in a craft unit does not bar an election in an overall unit which includes these craft employees less than 12 months later. Thiokol Chemical Corp. 123 NLRB 888 (1959). Similarly, the participation of truck drivers at one plant in an election did not bar an election in a subsequent multiplant unit of truck drivers. Leslie Metal Arts Company, Inc., 167 NLRB 693 (1967). This limitation upon Section 9(c)(3) is not applicable here as the unit in which the election was conducted and the petitioned-for unit are largely the same. The drivers and warehousemen constitute over 80% of the employees in the petitioned for unit. Cf. Robertson Bros. Dept. Store, 95 NLRB 271, 273 (1951) (elevator operators,

instant matter, inasmuch as the petition was filed 95 days before the anniversary of the election that was conducted in Case No. 29-RC-9083[8], I find that Section 9(c)(3) of the Act precludes further processing of this matter with regard to the drivers and warehousemen.[9] The facts in the case at bar are similar to those in American Bridge Division, United States Steel Corporation, 156 NLRB 1216 (1966). There, the employer commenced operations at a new facility on March 1, 1965. On March 9, 1965, the petitioner filed a petition and on May 11, an election was conducted. The petitioner received a majority of the valid votes cast and was certified on May 19, 1965. On August 23, 1965, approximately 3 months later, another petition was filed a by a rival union. The incumbent intervened on the basis of its collective bargaining agreement with the employer. The Board dismissed the petition but not on the basis of contract bar but upon application of the rule set forth in Vickers, Inc., supra. The Board held that the May 11, 1965, election was valid and therefore the application of Section 9(c)(3) compelled the dismissal of the pending petition. The holding in that case gives clear guidance for the resolution of the issue raised by the instant petition insofar as it affects the drivers and warehousemen. Accordingly, I am dismissing the

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charwomen and maids who had participated in a recent election included in a unit of selling and nonselling employees.)

[8] The petition herein was filed on May 25, 1999.

[9] I am also mindful that the petition was filed during the certification year. However, it is not clear that the Board's certification year bar rule, which is not set forth in the statute but rather is the product of Board law, would warrant dismissal of the petition in this case. In Ludlow Typograph Company, 108 NLRB 1463 (1954) the Board appeared to hold that where an employer and union enter into a contract within a year of the union's certification, as occurred in the instant matter, the contract, rather than the date of the certification, becomes controlling when evaluating the timeliness of a petition filed by a rival union. See also Stroehmann Brothers Company, 120 NLRB 752, fn. 2 (1958) In Stroehmann, the Board also held the petition in abeyance, rather than dismiss it, even though it was apparently filed more than 60 days prior to anniversary date of the prior election. However, that case was decided before Vickers, supra. Unlike the Board's certification year bar rule, Section 9 (c)(3) remains in effect after an initial collective bargaining

petition without prejudice to the re-filing thereof at an appropriate time insofar as it seeks an election among these employees.

With regard to the salespersons, the Board has held that the election year bar rule does not apply to employees who were not included in the unit in which the election was conducted. S.S. Joachim & Anne Residence, 314 NLRB 1191 (1994). Since the salespersons were not part of the above described unit, an election in a unit of these employees is not precluded by Section 9(c)(3) of the Act.

Inasmuch as the record does not reveal that the Employer employs any additional unrepresented employees, I find that the salespersons constitute an appropriate unit.[10]

Accordingly, I find the following unit appropriate for the purposes of collective bargaining:

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agreement is executed, even if that contract contains provisions that would disqualify it as a bar. Randolph Metal Works, supra.

[10] The Petitioner maintains that the currently certified unit is inappropriate because it excludes salespersons. In addition, both the Employer and Petitioner contend that it contains a supervisor. The record does not support their contention that the unit includes a supervisor. With regard to the salespersons, the Petitioner attempted to present testimony concerning the community of interest between the salespersons and warehousemen. The Hearing Officer did not allow extensive testimony in this area. I find that his actions were proper in this regard. To allow a party to collaterally attack a recently certified unit that contains no statutory infirmities would not further the Board's goal of promoting stability in bargaining and would be particularly unfair to the certified union. In addition, I am satisfied from the limited testimony presented during the hearing that the salespersons have a separate community of interest. The record revealed that the salespersons examine merchandise when it arrives in the morning, discuss quality and pricing issues, apparently with vendors and customers, and sell merchandise to customers, both face to face and over the phone. From the limited information in the record it is clear that the essential character of the sales work, which involves pricing and customer contact, both over the phone and in person, is separate and distinct from that of the work performed by the other employees. Sterns Paramus, 150 NLRB 799, 806 (1965). The fact that salespersons, at times, assist warehousemen in their duties does not negate their separate community of interest. In various other situations, the Board has found that selling and nonselling employees need not be included in the same unit. Sterns Paramus, supra; Arnold Constable Corporation, 150 NLRB 788 (1965); .Wickes Furniture, 231 NLRB 154 (1977). These considerations and the lack of record evidence that the Employer employs additional unrepresented employees that any of the parties seek to include in the unit, satisfy me that a unit of salespersons is appropriate

All full-time and regular part-time salespersons employed by the Employer at its facility located at 37-39 Brooklyn Terminal Market, Brooklyn, New York, excluding all drivers, warehousemen, clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote

whether they desire to be represented for collective bargaining purposes by.Local 21, Amalgamated Crafts and Trade Union.[11]

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before June 25, 1999. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

11 During the hearing, the Intervenor indicated that it did not wish to represent the salespersons in a separate unit. Accordingly, it will not appear on the ballot.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by July 2, 1999.

Dated at Brooklyn, New York, this 18th day of June 1999.

/S/ ALVIN BLYER

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